STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

GARY GILMORE

Defendant-Appellant.
_____/

Supreme Court No. 158716

Court of Appeals No. 334205

Lower Court No. 16-003006-01-FH

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellant
_____

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

(ORAL ARGUMENT REQUESTED)

STATE APPELLATE DEFENDER OFFICE

BY: **Steven D. Helton (P78141)**
Michael L. Mittlestat (P68478)
Jacqueline J. McCann (P58774)
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Table of Contents

Index of Authorities

Cases

Statutes

Rules

Other Authorities

Statement of Questions Presented

I. Did Gary Gilmore waive the question of his entitlement to an evidentiary hearing regarding the amount of restitution?

Court of Appeals answered “Yes”.

Gary Gilmore answers, "No".

II. Did the circuit court err in denying Gary Gilmore an evidentiary hearing on restitution?

Court of Appeals made no answer.

Gary Gilmore answers, "Yes".

Statement of Facts

I. Gary Gilmore's Plea and Sentence

Gary Gilmore waived his preliminary examination and was bound over to circuit court for trial as a fourth habitual offender on charges of organized retail crime, using a computer to commit a crime, possession of a financial transaction device, uttering and publishing a financial transaction device, and receiving and concealing stolen property - $200 or more but less than $1,000. (1a).

When he first appeared in circuit court, Judge James Callahan inquired: "Has there been any tally in regard to the amount of currency these transactions would have resulted in being misdirected?" (Calendar Conference Transcript ("CC"), 7a). When the prosecutor responded that it was around $18,000, defense counsel replied: "That's probably the only point of contention that there will be." (CC, 7a).

At their next appearance, the prosecutor announced the terms of a plea offer that he had extended: "the offer is to plead to Counts 1 and 2, dismiss the remaining counts as well as withdrawing the habitual with a sentence agreement of three-and-a-half years' probation with the first year in the Wayne County Jail. Restitution is set at $18,000.80." (Plea Transcript ("P"), 13a).

Following this announcement, the parties and Judge Callahan engaged in the following dialogue:

> [DEFENSE COUNSEL]: I have a question for the Court as well as for the People.
>
> THE COURT: No, I wouldn't allow him any access to computers.
>
> [DEFENSE COUNSEL]: That is not the question, sir.
>
> THE COURT: Oh, okay.
>
> [DEFENSE COUNSEL]: But the question would be that if we were to avail ourselves of the People's offer, would we be entitled to a restitution hearing based on the fact that they're arguing that my client is part of a larger ring and that other people are involved in it and --

THE COURT: So he wants to add further undue expense to the community and to -- what's the name of the financial, not the financial but the retail –

[DEFENSE COUNSEL]: Home Depot.

THE COURT: Home Depot. So he wants to add further expense to Home Depot and the community in establishing proofs that they would have to otherwise establish during the course of a trial. So, let's see, what would be the benefit to the community to allow such a thing? I guess nothing. And the only person who'd derive a benefit from that would be the defendant. What kind of negotiation is that? It's bullshit to me. How's that?

[DEFENSE COUNSEL]: I would like to also state that -- to request that on behalf of my client we add some discussions about that and we'll put it on the record.

THE COURT: Well, I guess it's up to the prosecuting attorney in that regard.

[PROSECUTOR]: I mean. Judge, in terms of restitution, we have something like 50 different receipts that all total up to the $18,000 -- I mean, that's what the proofs would show, and that's what we would be arguing with the restitution. But, I mean, I'm also more than willing to go talk to my supervisor about that and we can set restitution. But I know Home Depot's position as well as this, you know, hundred page binder with their investigation too shows that restitution is around that number, if not that number.

THE COURT: If someone isn't guilty of a crime though they shouldn't plead guilty to it.

[PROSECUTOR]: Agree.

THE COURT: I mean, if they aren't guilty of a crime they shouldn't plead guilty to it, they should go to trial and have a trial by their peers.

[PROSECUTOR]: Well, I think though, your Honor, we could have a situation where a person feels that they have a certain level of guilt but not necessarily guilty for the whole thing. And I know we always like to make the argument is he in for a penny in for a whole pound and that type of analogy, but still, I mean, we are talking about, you know, a certain number of people, we are talking about exact, you know, figure.

THE COURT: Yes, but if someone's unjustly accused then they should just go to trial. If the complaining witness is lying about what was taken from them let them prove it, it's up to them, they've got to prove it. Baloney. I don't need to establish my innocence, they have to prove my guilt.

DEFENDANT GILMORE: May I speak, your Honor?

> THE COURT: Why sure.
>
> DEFENDANT GILMORE: I do have a certain amount of guilt, as you —
>
> THE COURT: Oh, no, no, don't start telling me about your guilt. I don't want to hear that. Either you take advantage of this plea offer that's been extended to you or you go to trial, one or the other. I'm not going to hear a cockamamie bull story from you.
>
> DEFENDANT GILMORE: I wouldn't give you one, your Honor.
>
> THE COURT: Okay. Well, then, you've got to fish or cut bait today, my man. My dad used to use another expression.
>
> [DEFENSE COUNSEL]: Your Honor, my client would like to avail himself of the People's offer.
>
> THE COURT: He's a lot smarter than what I thought. Put the man over here.

(P, 14a-17a).

Mr. Gilmore then entered a guilty plea pursuant to the plea agreement. Restitution was not mentioned while Mr. Gilmore was submitting his plea. In providing a factual basis for his plea, Mr. Gilmore acknowledged that on March 22, 2017, he placed a UPC code on a door mount at a Home Depot in Plymouth Township. At the self-checkout machine, he scanned the UPC code that he had placed on the door mount, which caused the door mount to ring up at "a lesser price" than the $160 or $169 it should have cost. Mr. Gilmore asserted that he had engaged in this activity "one time before," March 22. (P, 25a-29a). Judge Callahan did not inquire how Mr. Gilmore's conduct could have resulted in $18,000.80 in damages to Home Depot,or reject Mr. Gilmore's plea as not accurate.

Judge Callahan learned at the scheduled sentencing hearing that the sentence agreement would constitute a seven month downward departure from the sentencing guidelines. (Sentence Transcript I ("S I"), 36a-37a). Judge Callahan stated, "I cannot follow this agreement; in good conscience I cannot. … [H]e needs to have time, serious time." (S I, 37a-38a). Judge Callahan scheduled a pretrial hearing for the following week. (S I, 38a).

At the scheduled pretrial hearing, Judge Callahan stated that the parties were present for sentencing and that, "[t]he agreement that was struck between the prosecution and the defense in regard to three-and-a-half years' probation is … out of the question." (Sentence Transcript II ("S II"), 42a). Judge Callahan inquired if the parties had reached "some subsequent agreement. (S II, 42a). The prosecutor stated that he was requesting that the court sentence Mr. Gilmore at the bottom of the guidelines. (S II, 42a-43a).

Judge Callahan then advised Mr. Gilmore that "the original agreement has been stricken." (S II, 43a). Judge Callahan stated that if Mr. Gilmore wished to withdraw his plea, he would be allowed to do so. (S II, 44a). Judge Callahan asked the prosecutor if he was still willing to dismiss the fourth habitual sentencing enhancement, and the prosecutor said that he was. (S II, 44a). Judge Callahan then explained to Mr. Gilmore:

> And they would also motion to dismiss Counts 3, 4 and 5. So the agreement that they have previously made you might say is partially being upheld by them of dismissing Counts 3, 4 and 5 and withdrawal of the habitual fourth which actually exposes you to life in prison or any number of years less than that. So that is, in fact, a substantial offer.

(S II, 44a).

When Mr. Gilmore's counsel advised Judge Callahan that Mr. Gilmore "would like to accept the offer," Judge Callahan clarified to Mr. Gilmore, "there is no actual offer, the only thing that's on the table right now are guidelines except for the fact that the People are desirous of withdrawing the habitual fourth and dismissing Counts 3, 4, and 5 at the time of sentencing, that's it." (S II, 45a).

Mr. Gilmore stated that he wished to proceed to sentencing. (S II, 45a).

Mr. Gilmore's presentence investigation report stated:

> In December, [sic] 2015 Home Depot located at 47725 Five Mile, Plymouth Twp., Michigan Loss Prevention department noticed a pattern of sales and returns and began an investigation dubbed, "Operation Barn Door". Defendant Gary Gilmore would purchase sliding doors valued between $169 and $199 at the U Scan. While at the U Scan, the defendant would affix a different UPC seal to the item for the amount of $13.98 to the higher price[d] item. The defendant would return the item without a receipt and receive a store credit for the original higher price. The noted activity took place at least 52 times at various Wayne County Home Depot locations, with an estimated loss of approximately $18,000.[1]

Judge Callahan sentenced Mr. Gilmore to 5 years of probation for his conviction of organized retail fraud and 30 months to seven years in prison for his using a computer to commit a crime conviction. Judge Callahan also ordered Mr. Gilmore to pay $18,000.00 in restitution. (S II, 47a). Defense counsel did not object or request a hearing on restitution.

II. Gary Gilmore's Appeal

Mr. Gilmore filed a delayed application for leave to appeal with the Court of Appeals, which asserted one argument: "THIS COURT MUST REMAND FOR A RESTITUTION HEARING." His application was denied. (51a).

Mr. Gilmore then filed a pro per application for leave to appeal to this Court. The Court remanded to the Court of Appeals for consideration as on leave granted of: "(1) whether the defendant waived the question of his entitlement to an evidentiary hearing regarding the amount of restitution; and if not, (2) whether the Wayne Circuit Court erred in denying him such a hearing." (52a).

The Court of Appeals concluded that Mr. Gilmore had waived his right to an evidentiary hearing on restitution by pleading guilty pursuant to the plea offer after being advised by Judge

[1] Mr. Gilmore's presentence investigation report is being filed separately.

Callahan that he would not accept the plea agreement if Mr. Gilmore did not waive his right to the hearing, and also by not requesting a hearing at his sentencing. (53a-55a).

Mr. Gilmore again sought leave to appeal to this Court. The Court then granted oral argument on Mr. Gilmore's application, and directed supplemental briefing on:

> (1)Whether the defendant waived the question of his entitlement to an evidentiary hearing regarding the amount of restitution, compare *People v Gahan*, 456 Mich 264, 276 (1997), overruled in part by *People v McKinley*, 496 Mich 410, 413 (2014) (stating that the failure to affirmatively request an evidentiary hearing regarding restitution is a waiver of a defendant's due process claim on appeal) with *People v Carter*, 462 Mich 206, 215 (2006) (defining waiver as "the intentional relinquishment or abandonment of a known right" and distinguishing waiver from forfeiture, which has been defined as "the failure to make the timely assertion of a right."); and if not, (2) whether the Wayne Circuit Court erred in denying the defendant such a hearing.

(56a).

Summary of Arguments

The $18,000 in restitution that Gary Gilmore has been ordered to pay is invalid because the course of conduct that gave rise to his convictions of organized retail crime and using a computer to commit a crime resulted in less than $200 in losses to his victim. MCL 780.766(2); *People v McKinley*, 496 Mich 410, 419-20; 852 NW2d 770 (2014). Judge James Callahan was on notice that the amount of restitution was in dispute and erred in refusing to conduct an evidentiary hearing so that the proper amount of restitution could be determined. MCL 780.767(4).

Even if the Court concludes that Mr. Gilmore initially waived his right to a restitution hearing by pleading guilty pursuant to a plea and sentence agreement after being told by Judge Callahan that a restitution hearing would not be conducted if he did so, that waiver was nullified along with the other aspects of the agreement. Waiver on the issue of restitution cannot be found where Judge Callahan ruled that the "original agreement has been stricken," and stated that "there is no actual offer, the only thing that's on the table right now are guidelines except for the fact that the People are desirous of withdrawing the habitual fourth and dismissing Counts 3, 4 and 5 at the time of sentencing, that's it." (S II, 43a, 45a). Judge Callahan was well aware that Mr. Gilmore disputed the restitution amount and did not list $18,000 in restitution as amongst the items that Mr. Gilmore was agreeing to by not withdrawing his plea after the original deal was struck.

Additionally, to the extent Judge Callahan believed that the parties' sentence agreement constituted an agreement to waive review of a restitution award that greatly exceeded the amount permitted by the Crime Victim's Rights Act, the Court should clarify that such an agreement would not be enforceable. In the present case, however, because the prosecutor agreed that Judge Callahan should conduct a restitution hearing, Judge Callahan lacked any basis for holding that

Mr. Gilmore would not be entitled to a restitution hearing if he pled guilty pursuant to the settlement offer.

Arguments

I. Gary Gilmore did not waive the question of his entitlement to an evidentiary hearing regarding the amount of restitution.

Comments made by this Court in *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997), overruled in part by *People v McKinley*, 496 Mich 410, 413; 852 NW2d 770 (2014), indicated that a defendant waives his entitlement to a restitution hearing and to a due process claim related to restitution by failing to object and request a restitution hearing at sentencing. However, *Gahan* issued at a time when courts, including this Court, often used 'waiver' and 'forfeiture' interchangeably. The Court has since clarified that they are distinct concepts. The Court should clarify that defendants do not 'waive' their rights related to restitution by failing to timely assert those rights.

Mr. Gilmore did not waive his right to a restitution hearing. Initially, he asked Judge Callahan if the court would conduct such a hearing if he submitted a guilty plea pursuant to a plea and sentence agreement, and Judge Callahan definitively ruled that it would not. For the reasons discussed in Argument Section II, this was an error, which Mr. Gilmore sought to make a record of specifically so that it could be challenged on appeal.

Further, even if Mr. Gilmore could be deemed to have waived his right to a restitution hearing by pleading guilty pursuant to a sentence agreement that provided for a one-year jail term and stated "restitution: 18,000.80," that waiver was nullified when Judge Callahan informed him that the agreement was "stricken," "off the table," and that "there is no actual offer," and then sentenced Mr. Gilmore to prison. Judge Callahan did not include restitution on the list of items to which Mr. Gilmore was agreeing by proceeding to sentencing instead of withdrawing his guilty pleas even though Judge Callahan was aware that the amount of restitution was the parties' "only point of contention." (CC, 7a).

A. Waiver and forfeiture are distinct doctrines.

"Waiver has been defined as the intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), quoting *People v Carines* 460 Mich 750, 762-63 n 7; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 733 (1993) (internal quotation marks excluded). "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) (defendant waived error in omitting *actus reus* element of offense from jury instruction where his attorney "explicitly and repeatedly approved the instruction.").

"One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Id.* at 215, quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996).

As the Court explained in *Carter*, waiver "differs from forfeiture, which has been explained as 'the failure to make the timely assertion of a right.' " *Id.* at 215, quoting *Carines*, 462 Mich at 762-63. Rights or errors that have been forfeited are reviewed under the plain error standard of review. *Id.* at 216, citing *Griffin*, 84 F3d at 924-26.

B. This court's opinion on waiver in *People v Gahan* did not survive the distinction this court later drew between waiver and forfeiture in *People v Carines* and *People v Carter*.

The United States Supreme Court recently noted: "The terms waiver and forfeiture–though often used interchangeably by jurists and litigants–are not synonymous." *Hamer v Neighborhood Housing Services of Chicago*, _US_; 138 S Ct 13, 17 n 1 (2017). Prior to *Carines*, 460 Mich 750, this Court had not always taken care to distinguish between the two. The imprecise language used in *Gahan*, 456 Mich at 273 – that a defendant "waives" an evidentiary hearing on restitution

through inaction – has resulted in much confusion since *Carines*, which has resulted in inconsistent application of *Gahan* in the Court of Appeals.[2] The Court should clarify that a defendant does not waive his entitlement to a restitution hearing or to a due process claim related to restitution by failing to object and request such a hearing at sentencing.

Gahan, 456 Mich at 273 erroneously held that MCL 780.766(2) provided courts the authority to order defendants to pay restitution for losses attributable to uncharged criminal conduct. See *McKinley*, 496 Mich at 421. *Gahan*, 456 Mich at 565-76 asserted that it did not violate due process to require defendants to make restitution for crimes that they had not been convicted of committing because MCL 780.767(4) requires that the amount of restitution be established by a preponderance of the evidence when it is in dispute. *Gahan* then held: "Although defendant did not receive such an evidentiary hearing, that does not give rise to error in this case because … at sentencing defendant did not request an evidentiary hearing regarding the amount of restitution that was properly due. This was a waiver of his opportunity to for an evidentiary hearing and he

[2] In *People v Foster*, 319 Mich App 365, 374; 901 NW2d 127 (2017), the defendant did not object to the amount of restitution the circuit court ordered at sentencing, and apparently did not request an evidentiary hearing. The Court of Appeals reviewed the restitution award for plain error. *Id.* at 374. See also *People v Dodson*, unpublished opinion of the Court of Appeals issued November 17, 2016 (Docket No. 328481) (applying plain error review to restitution award where defendant did not object to restitution order or request restitution hearing at sentencing); *People v Rasho*, unpublished opinion of the Court of Appeals issued March 7, 2013 (Docket 307351) (vacating restitution order and remanding for a restitution hearing where defendant did not object to restitution order at sentencing but filed a post-conviction motion to correct invalid sentence in which he challenged restitution); *People v Jordan*, unpublished opinion of the Court of Appeals issued November 13, 20018 (Docket 280457) (vacating restitution award and remanding to the trial court for recalculation of correct amount of restitution owed where defendant did not object to restitution at sentencing). But see *People v Plevinski*, unpublished opinion of the Court of Appeals issued January 27, 2009 (Docket 281237) (defendant waived any challenge to amount of restitution by failing to object to amount of restitution at sentencing) and *People v Barbour*, unpublished opinion of the Court of Appeals issued January 20, 2011 (Docket 295079) (defendant waived opportunity for an evidentiary on proper amount of restitution by failing to challenge the restitution figure announced at sentencing).

cannot now argue that he was denied due process." *Id.* at 276. In a footnote, the *Gahan* Court asserted: "It is incumbent on the defendant to make a proper objection and request an evidentiary hearing. Absent such objection, the court is not required to order, *sua sponte*, an evidentiary proceeding to determine the proper amount of restitution due. … Instead, the court is entitled to rely on the amount recommended in the presentence investigation report 'which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information.' " *Id*. at n 17, quoting *People v Grant*, 455 Mich 221, 233-34; 565 NW2d 389 (1997).

Gahan and *Grant* both issued before this Court drew a clear distinction between waiver and forfeiture in *Carines*. *Carines*, 460 Mich at 762 n 7, quoting *Olano*, 507 US at 733, made explicit that: "[w]hereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' " A party does not waive his right to an evidentiary hearing on restitution or to a due process claim related to restitution by failing to timely object and assert his right to such a hearing at sentencing. At most, the failure to object to the amount of restitution ordered or to request a restitution hearing at sentencing would constitute forfeiture.

C. Mr. Gilmore did not waive or forfeit, but adequately preserved his right to appeal the circuit court's error in ruling that he could not plead guilty pursuant to the original agreement and receive a hearing on restitution.

From the start, Judge Callahan was made aware that the amount of restitution was in dispute because defense counsel, the prosecutor, and Mr. Gilmore personally all took turns attempting to explain the dispute to him.[3] Judge Callahan was also aware that Mr. Gilmore was requesting that

[3] Defense counsel stated that Mr. Gilmore was requesting a restitution hearing because "they're arguing that my client is part of a larger ring and that other people are involved in it," before he was interrupted. (P, 14a).

he resolve the dispute based on the evidence by conducting a hearing. It is clear that Judge Callahan understood Mr. Gilmore's request because in response, he essentially described the type of hearing Mr. Gilmore was requesting: "So he wants to add further expense to Home Depot and the community in establishing proofs that they would have to otherwise establish during the course of the trial?" (P, 14a). Given the notice provided, MCL 780.767(4) required that Judge Callahan resolve the dispute as to the proper amount of restitution by a preponderance of evidence. Once Judge Callahan was on notice of the dispute, the error was preserved.

After Mr. Gilmore advised Judge Callahan that he wanted the court to conduct a restitution hearing and explained why it was necessary that it conduct one, Judge Callahan definitively ruled that he would not conduct the hearing if Mr. Gilmore pled guilty pursuant to the agreements. The question of whether Mr. Gilmore was entitled to an evidentiary hearing on restitution was not waived or forfeited. It was properly preserved for appellate review. See, e.g., MRE 103; *Franklin Mining Co v Harris*, 24 Mich 115, 117 (1871); *In re Forfeiture of Certain Personal Property*, 441 Mich 77, 84; 490 NW2d 322 (1992) (preservation of issue for appeal requires objection or request by party and definitive ruling on objection or request by the lower court).

Where the parties have put the sentencing court on notice that the proper amount of restitution is in dispute, MCL 780.767(4) requires the court to determine the proper amount of restitution due based on evidence. MCL 780.767(4) provides: "***Any dispute*** as to the proper

---

The prosecutor told Judge Callahan: "we could have a situation where a person feels that they have a certain level of guilt but not necessarily guilty for the whole thing. And I know we always like to make the argument is he in for a penny in for a whole pound and that type of analogy, but still, I mean, we are talking about, you know, a certain number of people, we are talking about exact, you know, figure." (P, 5a-6a).

Mr. Gilmore stated, "I do have a certain amount of guilt," before he was interrupted. (P 16a). Additionally, in providing a factual basis for his convictions, Mr. Gilmore asserted that his charged and uncharged criminal conduct aimed at Home Depot could not have resulted in even $400 in damages to Home Depot. (P, 15a-19a).

amount of restitution ***shall be resolved*** by the court by a preponderance of the evidence." The use of the term "any dispute" covers a "wide expanse,"[4] *Altobelli v Hartmann*, 499 Mich 284, 307; 884 NW2d 537 (2106), and the statute does not specify that the dispute must be raised at sentencing or allow courts to ignore disputes that are raised at the plea hearing. The "use of the term 'shall' rather than 'may' indicates mandatory rather than discretionary action." *Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994) (citations omitted). This Court's decision in *Grant*, 445 Mich at 542-43, demonstrates that the proper application of this mandatory term. In that case, the Court held that the trial court erred by not instructing the jury on insanity even though the defendant did not request the instruction, where the insanity statute, MCL 768.29a, provided: "If the defendant asserts a defense of insanity in a criminal action which is tried before a jury, ***the judge shall***, before testimony is presented on [the defendant's insanity], instruct the jury on the law [of insanity]." (emphasis added).

"If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." *People v. Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). MCL 780.767(4) is not ambiguous. In enacting it the Legislature intended for our courts to determine the proper amount of restitution based on evidence when it is in dispute.

[4] Indeed, an agreement to arbitrate "any dispute," between the parties requires the parties to arbitrate whether the agreement itself is enforceable. See *Rent-A-Center, West, Inc. v Jackson*, 561 US 63 (2010).

Because Judge Callahan was on notice that the parties disputed the proper amount of restitution, MCL 780.767(4) required that he resolve the dispute based on evidence.[5] Even though Mr. Gilmore did not object or request a hearing on restitution at sentencing, Judge Callahan erred in failing to determine the amount of restitution by a preponderance of the evidence – i.e., conduct an evidentiary hearing on restitution – because he was on notice that Mr. Gilmore disputed that restitution could be properly set at $18,000. See note 3.

Judge Callahan erred when he ruled that despite being on notice of the parties' dispute, he would not conduct an evidentiary hearing on restitution if Mr. Gilmore pled guilty pursuant to the original plea and sentence agreements between the parties. Mr. Gilmore did not thereafter intentionally relinquish his right to an evidentiary hearing regarding the correct amount of restitution by submitting his guilty plea pursuant to the court's settlement offer. Mr. Gilmore was entitled to submit a guilty plea pursuant to the prosecutor's offer and have the circuit court determine restitution based on the evidence.

D. Even if Mr. Gilmore had waived his entitlement to an evidentiary hearing on restitution by initially agreeing to a sentence agreement that provided for a one-year jail sentence and 'restitution: $18,000.80', Judge Callahan later notified the parties that he was not going to follow the sentence agreement. Therefore, any waiver regarding restitution that may have existed was nullified when the court struck the

[5] *Grant*'s 455 Mich at 233-34 assertion that the sentencing court is entitled to presume the accuracy of the presentence report's statement as to restitution where the defendant does not object is not applicable in the present case. Mr. Gilmore's presentence report was not updated after the first scheduled sentencing hearing, and referenced the parties' plea and sentence agreements, which Judge Callahan had struck. At the actual sentencing hearing, Judge Callahan did not reference the presentence report and did not give Mr. Gilmore "an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report." MCR 6.425(E)(1)(b). Further, the presentence report merely asserts that "the noted activity [of scanning a fraudulent UPC code at a Home Depot self-check out machine to pay less than the retail value of a product] took place at least 52 times at various Wayne County Home Depot locations, with an estimated loss of approximately $18,000." Mr. Gilmore does not dispute this activity occurred 52 times or resulted in a loss of $18,000 to Home Depot, but he disputes his responsibility for all of it. He disputed explicitly at the plea hearing, however, that he engaged in "the noted activity" more than twice. (P, 15a-19a).

sentence agreement, did not list restitution amongst the new sentencing terms, and Mr. Gilmore was not informed that he would be waiving his right to a hearing on restitution by proceeding to sentencing.

Mr. Gilmore pled guilty pursuant to a plea agreement that contained a sentence agreement. The terms of the sentence agreement were: "3 ½ years probation 1st year [Wayne County Jail] Restitution: $18,000.80." (10a).

At the originally scheduled sentencing hearing, after learning that the sentence specified in the sentence agreement would constitute a downward departure from the sentencing guidelines, Judge Callahan stated that he would not sentence Mr. Gilmore pursuant to the parties' sentence agreement. (S I, 38a).

At the next hearing, before providing Mr. Gilmore the opportunity to withdraw his plea, Judge Callahan stated: "the original agreement has been stricken." S II, 43a). The prosecutor stated that he was still willing to dismiss the habitual offender sentencing enhancement. (S II, 44a). Judge Callahan told Mr. Gilmore that if he did not withdraw his plea, the prosecutor, "would also motion to dismiss Counts 3, 4 and 5." (S II, 44a). Judge Callahan clarified that "there is no actual offer, the only thing that's on the table right now are guidelines except for the fact that the People are desirous of withdrawing the habitual fourth and dismissing Counts 3, 4, and 5 at the time of sentencing, ***that's it***." (S II, 45a) (emphasis added).

Judge Callahan gave no indication whatsoever that the portion of the initial sentence agreement regarding restitution somehow survived his decision to reject that agreement when on June 15, 2016, he advised Mr. Gilmore, the "original agreement has been stricken," "there is no offer," and "the only thing that's on the table," was a *Cobbs* evaluation to a within-guidelines sentence and dismissal of certain charges and the habitual offender sentencing enhancement. Additionally, the prosecutor gave no indication that his willingness to dismiss the sentencing

enhancement and counts 3, 4, and 5 was contingent on Mr. Gilmore's agreement to waive his right to an evidentiary hearing on restitution or to agree to pay $18,000 in restitution.

Thus, even if the Court concludes that Mr. Gilmore initially waived his right to a hearing on restitution when he submitted his guilty plea on May 18, 2016, that waiver was "stricken." When he decided to forego plea withdrawal on June 15, 2016, Mr. Gilmore was not informed that despite the agreement being stricken, he would still be required to pay $18,000 in restitution and would still be required to forego an evidentiary hearing on restitution.

Mr. Gilmore could not waive his right to the hearing or to challenge the amount of restitution ordered without providing any indication that he was doing so. "[C]ourts that have examined what constitutes a waiver have consistently stated that a waiver must simply be explicit, voluntary, and made in good faith." *Sweebe v Sweebe*, 474 Mich 151, 157; 712 NW 2d 708 (2006). "In the context of this case, 'explicit' means … not completely silent on the issue." *Id.* See also 31 CJS Estoppel and Waiver § 95 (footnotes and citations omitted) (waiver requires knowledge of the right being waived and an actual intention to relinquish it).

It was in no way clear at the hearing on June 15, 2016, that Mr. Gilmore was waiving his right to a restitution hearing by proceeding to sentencing rather than withdrawing his plea. To the contrary, from Judge Callahan's statements to Mr. Gilmore, it appeared that any effect the previous agreement may have had on the issue of restitution had been nullified. Therefore, Mr. Gilmore did not waive his entitlement to a restitution hearing or his right to challenge the amount of restitution ordered.

E. At worst, the restitution amount should be reviewed for plain error under the forfeiture doctrine. Mr. Gilmore would still be entitled to relief.

Even if the Court concludes counsel's failure to renew the request for a restitution hearing at sentencing constituted forfeiture, Mr. Gilmore is entitled to remand for an evidentiary hearing

on restitution under the plain error standard of reversal. *Grant*, 445 Mich at 552. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *Carines*, 460 Mich at 763, quoting F R Crim P 52(b).

"To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *Id.*, quoting *United States v Olano*, 507 US 725, 732 (1993).

Judge Callahan erred in ordering $18,000 in restitution without conducting an evidentiary hearing. Furthermore, this error was clear and obvious. The parties provided Judge Callahan notice that the amount of restitution was in dispute. Further, in providing a factual basis for his plea, Mr. Gilmore asserted that his charged criminal conduct resulted in less than $200 in damages to Home Depot, and that his uncharged criminal conduct resulted in less than an additional $200 in damages to Home Depot. (P, 15a-19a). The amount of restitution ordered by Judge Callahan was much greater than the amount of restitution that is authorized by MCL 780.766(2). See *People v McKinley*, 496 Mich 410, 419-20; 852 NW2d 770 (2014). Even if Judge Callahan was entitled to rely on the Court of Appeals' opinion in *People v Foster*, 319 Mich App 365, 382-83; 901 NW2d 127 (2017), which purports to authorize defendants to agree to pay an amount of restitution not authorized by law for damages to a victim caused by the defendant's uncharged conduct in exchange for a reduction in charges, *Foster* still required that the amount of restitution ordered be based on the defendant's own criminal conduct. *Id.* Judge Callahan asked Mr. Gilmore how many times he scanned a fraudulent UPC code at Home Depot and he stated that he had done so on only two occasions. (P, 17a-18a).

The plain error affected Mr. Gilmore's substantial rights. The requirement that the error "affect a substantial right … in most cases means that the error must have been prejudicial: It must

have affected the outcome of the [trial] court proceedings." *Olano*, 507 US at 734. Since the $18,000 in restitution that was ordered was approximately ninety times greater than the amount of restitution authorized by MCL 780.766(2), Mr. Gilmore was prejudiced by Judge Callahan's failure to conduct a hearing on restitution.

The plain error that affected Mr. Gilmore's substantial rights requires reversal in this case. "[O]nce a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Carines*, 460 Mich at 763-64, quoting *Olano*, 507 US at 763-37 (internal quotations and alterations omitted). Mr. Gilmore is actually innocent of causing $18,000 in damages to Home Depot, and is currently being required to pay for damages to Home Depot caused by others who engaged in the same general criminal scheme that he pled guilty to engaging in. Independent of Mr. Gilmore's actual innocence, however, Mr. Gilmore advised Judge Callahan that he disputed causing $18,000 in damages to Home Depot and requested a hearing so that the proper amount of restitution could be determined. Judge Callahan indicated to him that he had predetermined his guilt before he had submitted his plea and repeatedly threatened him with a harsh prison sentence. CC 4-7; SH I 7. Given these circumstances, this Court should hold that the 'forfeited' error seriously affected the fairness, integrity or public reputation of judicial proceedings, and reverse and remand to the circuit court so that an evidentiary hearing on restitution can be conducted and the proper amount of restitution can be ordered.

II. The circuit court erred in denying Mr. Gilmore's request that it conduct an evidentiary hearing on restitution.

The Court's directive to answer whether the circuit court erred in *denying* Mr. Gilmore an evidentiary hearing on restitution requires a separate analysis from whether the circuit court simply erred in failing to conduct an evidentiary hearing after striking the sentence agreement. The answer is the same. Judge Callahan erred in ruling that he would not conduct a hearing on restitution if Mr. Gilmore pled guilty pursuant to the plea and sentence agreement.

A. The prosecutor assented to Mr. Gilmore's request that the circuit court conduct an evidentiary hearing on restitution. The court erred in overriding or adding terms to the parties' agreement.

After Mr. Gilmore asked Judge Callahan whether Mr. Gilmore would be entitled to a restitution hearing if he pled guilty pursuant to the plea and sentence agreement, Judge Callahan expressed frustration with the question, but ultimately stated, "I guess it's up to the prosecuting attorney in that regard." (P, 4a-5a).

The prosecutor then indicated that he was willing to present proofs and argument about restitution, which is what occurs during a restitution hearing:

> I mean. Judge, in terms of restitution, we have something like 50 different receipts that all total up to the $18,000 -- I mean, that's what the proofs would show, and that's what we would be arguing with the restitution. But, I mean, I'm also more than willing to go talk to my supervisor about that and we can set restitution. But I know Home Depot's position as well as this, you know, hundred page binder with their investigation too shows that restitution is around that number, if not that number. (P, 5a).

The prosecutor also attempted to explain to Judge Callahan why Mr. Gilmore was seeking an evidentiary hearing while also seeking to plead guilty pursuant to the settlement offer:

> Well, I think though, your Honor, we could have a situation where a person feels that they have a certain level of guilt but not necessarily guilty for the whole thing. And I know we always like to make the argument is he in for a penny in for a whole pound and that type of

> analogy, but still, I mean, we are talking about, you know, a certain number of people, we are talking about exact, you know, figure. (P, 5a-6a).

Notwithstanding Judge Callahan's initial position that it was up to the prosecutor whether Mr. Gilmore would be entitled to a restitution hearing if he pled guilty pursuant to the settlement offer, Judge Callahan ultimately decided that Mr. Gilmore could not have the hearing if he accepted the offer, despite the prosecutor's acquiescence. Judge Callahan exceeded his authority by overriding the prosecutor's agreement to establish the proper amount of restitution by evidence.

A circuit court does not have the authority to insert terms into the parties' plea agreement, which Judge Callahan attempted to do here by ruling that he would not conduct a hearing on restitution if Mr. Gilmore pled pursuant to the settlement offer. See *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982). See also *People v Grove*, 455 Mich 439, 485; 566 NW2d 547 (1997) ("Judicial modification of prosecutorial decisions is appropriate only if the decisions are unconstitutional, illegal, ultra vires, or an abuse of prosecutorial authority.").[6]

Because the prosecutor agreed that the circuit court should conduct a hearing on restitution, Judge Callahan erred in denying Mr. Gilmore such a hearing.

B. The prosecutor and defendant cannot agree to waive review of a restitution award that is clearly invalid.

Even if the prosecutor had not agreed to accommodate Mr. Gilmore's request for an evidentiary hearing on restitution, Judge Callahan would have still erred in refusing to conduct one. Judge Callahan's decision does not appear to be based on any court rule or case law. It is possible, however, that he may have interpreted the aspect of the initial sentence agreement that provided "restitution: $18,000.80" as Mr. Gilmore's agreement to pay that amount even though

[6] Trial courts now enjoy even less supervisory power over prosecutors than they enjoyed when *Grove* issued. See *People v Franklin*, 491 Mich 916; 813 NW2d 285 (2012); MCR 6.310(B).

"the proper amount of restitution," that is, the amount of restitution authorized by MCL 780.766(2), was far less. The Court should clarify that parties to a plea agreement may not agree to an amount of restitution that is not authorized by the Crime Victim's Rights Act, MCL 780.751, *et seq*., and that a defendant cannot waive review of an invalid restitution award by pleading guilty pursuant to a sentence agreement that specifies a clearly invalid amount of restitution.

Even though the initial sentence agreement provided: "Restitution: $18,000," both parties agreed that the proper amount of restitution remained in dispute. Where such a dispute exists, MCL 780.767(4), requires that it be resolved by actual evidence. The Court of Appeals in *People v Hart*, 211 Mich App 703, 708-709; 536 NW2d 605 (1995), held that under the prior version of MCL 760.767(4), which required the sentencing court to consider the defendant's ability to pay in determining the amount of restitution to order, a defendant's agreement to pay restitution as part of his plea agreement created a rebuttable presumption that the defendant had the ability and resources to pay. This same reasoning could be applied to sentence agreements that purport to require the defendant to pay a specific amount of restitution without wholly ignoring the requirement that disputes about restitution be resolved based on evidence.[7]

However, when MCL 780.767 was amended in 1997, the Court of Appeals recognized that "because restitution is now mandatory it is no longer open to negotiation during the plea-bargaining or sentence bargaining process." *People v Ronowski*, 222 Mich App 58, 59–60; 564

[7] For example, in the present case, the prosecutor claimed to have 52 Home Depot receipts evincing 52 fraudulent transactions, resulting in approximately $18,000 in damages to Home Depot. (P, 5a). Mr. Gilmore could have presumably rebutted the presumption that he caused $18,000.80 in damages to Home Depot by subpoenaing the relevant Home Depot security camera recordings to prove that he participated in only two of those transactions and/or by establishing that the $18,000.80 figure did not take into account the $13.98 that Home Depot did receive during each transaction.

NW2d 466 (1997). More recently though, the Court of Appeals held that where the parties ignore *Ronowski* and do plea bargain over restitution, the defendant gives up his right to challenge the restitution that was ordered pursuant to the plea agreement, even when the amount of restitution ordered is facially invalid. *People v Foster*, 319 Mich App 365, 382-83; 901 NW2d 127 (2017).

This Court has never held that parties may agree to a sentence that is known to be invalid, by, for example, agreeing to a maximum prison term that extends beyond the number of years permitted by statute or to a restitution award that is based solely on uncharged conduct. A holding by this Court that Judge Callahan did not err by refusing to conduct a restitution hearing would encourage prosecutors and defendants to exchange impermissibly high restitution awards for reduced charges and lower sentences, or, potentially, impermissibly low restitution awards for increased charges and higher sentences. The Court should decline to do so if it reaches this issue for a variety of reasons, including those set forth below.

Sentence agreements that specify restitution awards that are clearly greater than what the defendant could be required to pay if he were to be convicted at trial are unconscionable, and should be deemed unenforceable as a matter of public policy and Due Process.[8] Such agreements will never be disrupted if defendants implicitly 'waive' review of the resulting restitution award by accepting the settlement offer. "Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term. If, under a fair appraisal of the circumstances, the weaker party was free to accept or reject the term, there was no procedural unconscionability." *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 144; 706 NW2d 471 (2005), citing *Allen v Michigan Bell Tel Co*, 18 Mich App 632, 637; 171 NW2d 689 (1969). Defendants who enter into plea negotiations are necessarily bargaining for their freedom. The prosecutor and the defendant

[8] US Const, Am XIV; Const 1963, art 1, § 17.

have equivalent levels of interest in matters such as the dismissal of charges and sentence lengths, as well as in avoiding the risks and costs associated with not reaching an agreement. Where a defendant is facing a substantial term of incarceration, his level of interest in the amount of restitution that he will be ordered to pay decreases to the point of irrelevance. In this sense, the prosecutor and defendant are not on equal footing when it comes to negotiations over restitution. Most people would eagerly agree to pay $18,000.80 they do not legally owe to avoid a possible life sentence, especially where they "have a certain amount of guilt," which could correctly result in their convictions. (P, 6a). Where, as here, the restitution amount specified is thousands of dollars more than what the defendant could be ordered to pay if he were convicted of all charges at trial, the agreement is also substantively unconscionable because the term is not substantively reasonable. *Clark*, 268 Mich App at 144.

Additionally, because crime victims have a constitutional and statutory right to restitution, Const 1963, art 1, § 24; MCL 780.766(3), the prosecution and the defense lack the authority to agree upon a specific amount of restitution because they do not possess the only interests at stake. See, e.g., *E E O C v Waffle House, Inc*, 534 US 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty."). There would be no equitable solution if the defendant and prosecutor agreed to a specific amount of restitution as part of a plea bargain, the defendant began serving his sentence, and the victim then successfully motioned the court to substantially increase the amount of restitution based on new information. Presumably the plea that the defendant entered would no longer be voluntary and understanding.

Conversely, crime victims are not entitled to a windfall under the Crime Victim Rights Act. Where a sentence agreement specifies that a defendant will pay restitution for damages resulting from crimes that he has not been charged with committing, a finding that the agreement prevents

him from requesting an evidentiary hearing also presumably prohibits him from moving to reduce the amount of restitution he has been ordered to pay based on new information. MCL 780.766(2); MCR 6.430(A). This is likely so because new information, such as evidence that the defendant's criminal conduct resulted in no damages to the victim, could be utilized to bring the restitution award down to zero. If Mr. Gilmore were to discover that another defendant has paid some amount of restitution to Home Depot based on the same "noted activity" that gave rise to his convictions, he would then be unable to seek a corresponding reduction in the amount of restitution he has been ordered to pay.[9]

The Court of Appeals has held that restitution is not a punishment because "restitution is, at its essence, a restorative remedy that compensates victims for economic losses suffered as a result of a defendant's criminal conduct," and therefore, the Sixth Amendment protections recognized in *Apprendi v New Jersey*, 530 US 466 (2000) do not apply. *People v Corbin*, 312 Mich App 352, 172-73; 880 NW2d 2 (2015), quoting *United States v Leahy*, 438 F3d 828, 338 (CA 3, 2006). But if restitution does not rationally correspond to the victim's injury, then it is unclear how it is not a penalty. If restitution is deemed a penalty, the manner that restitution is currently determined under the Crime Victims' Rights Act likely violates the Sixth Amendment. See *Southern Union Co v US*, 567 US 343, 360 (2012) ("the rule of *Apprendi* applies to the imposition of criminal fines.").

Finally, while sentence agreements that provide for a specific amount of restitution are not quite the "pay-or-stay" sentencing practice the Court ended in 2016[10] because a defendant cannot

[9] Judge Callahan did not order that restitution be paid jointly and severally to Home Depot, despite being advised by Mr. Gilmore that "Bud" was "one of the defendants" who was also involved in utilizing fraudulent UPC codes to purchase door mounts from Home Depot at a reduced price. (P, 16a-17a).

[10] Administrative Order No. 2015-12 (2016).

be incarcerated for failing pay restitution where he does not have the ability to pay, see, e.g., MCR 6.445(G), it is one small step removed. Common sense would indicate prosecutors mainly extend plea offers that include an inflated restitution term to defendants whom they believe have the ability to pay the amount specified.

The Court can avoid these issues by holding that the circuit court erred in refusing to conduct a hearing on restitution because it was on notice that there was a dispute as to the proper amount of restitution, because the factual basis of Mr. Gilmore's plea did not evince that an $18,000 restitution award was authorized by MCL 780.766(2), and/or because Mr. Gilmore preserved, or at worst, forfeited his claim that the restitution amount was erroneous. See Issue I, *supra*.

Request for Relief

WHEREFORE, Defendant-Appellant Gary Gilmore respectfully requests that this Honorable Court remand this matter to the circuit court and direct the circuit court to conduct an evidentiary hearing on restitution.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Steven D. Helton

BY: _____

Steven D. Helton (P78141)
Michael L. Mittlestat (P68478)
Jacqueline J. McCann (P58774)
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Date: August 15, 2019